COÖPERATIVE PRODUCTIVE EFFORTS AND THE SHERMAN ANTI-TRUST ACT.—The question whether the Sherman Anti-Trust Act (26 Stat. at L. 209), which declares that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal, is violated by an agreement apparently substituting intelligent competition in quality, price and service for unrestrained or so-called "cut-throat" competition, was presented to the Supreme Court of the United States in *American Column and Lumber Co.* v. *United States,* 42 Sup. Ct. 114. The scheme is popularly known as the "Open Competition Plan." The defendant parties to the agreement were operators of hardwood mills, controlling approximately one-third of the output of that product in the United States. The stated purpose of the association was to disseminate among members accurate knowledge of production and market conditions so that each member might gauge the market intelligently, to make competition open, and to substitute in estimating market conditions "the frank statements of competitors for the misleading statements of the buyer." Any purpose to agree upon prices or production was disclaimed. The plan as adopted provided for periodical reports by each of the members, to be made to a central bureau, giving detailed information of sales, shipments, production, stock on hand, and prices. Detailed summaries of these were then to be sent to each member, and using the data obtained from the individual reports as a basis, market letters were to be sent out, "pointing out changes in conditions, both in the producing and consuming sections, giving a comparison of production and sales and in general an analysis of the market conditions." Monthly meetings for general discussion were to be held by the members. In operation the plan was departed from in that the report letters and the discussions at the meetings, instead of dealing with past transactions, dealt largely with the subjects of prices and production in the future.

Mr. Justice Clarke delivered the opinion of the court, holding that the plan fell within the condemnation of the Anti-Trust Act. He reasoned that while there was no definite agreement as to production and prices, this was supplied by the disposition of men to follow their most intelligent competitors and to make all the money possible. From the evidence, particularly the discussions and the reports, an agreement to curtail production and to maintain prices at the then high level could be inferred, if it was not express. Mr. Justice Brandeis, with whom Mr. Justice McKenna concurred, dissented. He could find no evidence that the plan was used as an instrument to restrain trade. The Sherman Law did not prohibit every lessening of competition, and furthermore, the practice under the plan did not restrain competition. It was not illegal to restrain competition by timely advice to prevent the evils of over-production. Equality of opportunity among the manufacturers was created by making valuable knowledge available to the smallest as well as to the largest dealer. Mr. Justice Holmes also dissented, saying that he could not suppose that the Sherman Act set itself against knowledge; that a combination in unreasonable restraint of trade imported an attempt to

override normal market conditions, while an attempt to conform to them seemed most reasonable.

This summary of the opinions rendered gives some idea of the salient issues of law and fact involved. Inasmuch as the statute is a criminal statute, as Mr. Justice Holmes observed in the *Northern Securities* case, 193 U. S. 197, and also that it cannot receive a different interpretation on a bill for an injunction than it is to receive on an indictment, a review of the evidence fails to satisfy that the government established that there was an agreement in restraint of trade. Conceding that there was an agreement, the tendency of which was somewhat to restrict competition, the larger question presented, as intimated above, is whether the Sherman Act is satisfied if the essence of competition remains, or whether it is satisfied only if competition is blind, unrestrained, and wasteful? It seems that the former is not necessarily condemned by the statute.

Competition as such is nowhere mentioned in the act. Since every agreement that has been brought to the public attention in suits for violating it has involved the question whether competition has been restrained, it has become almost habitual to consider the Anti-Trust Act as guaranteeing the existence of competition in the status in which it has been known in the past. However, there is frequent judicial acknowledgment of the fact that restraint of trade is a broader conception than restraint of competition. The act, then, is not intrinsically concerned with competition, but with some larger field, and the obliteration of competitive efforts may be evidence that the act has been violated.

It is very frequently said that competition is the life of trade. It is, however, so common to find agreements upheld which involve some restraint of competition, that it may be ventured, both as a matter of fact and as a legal proposition, that trade is in many instances dependent for its life or effective operation upon a partial absence of competition. Competition is not invariably a public benefaction; it may be carried to such an extent as to be made a general evil. *Leslie* v. *Lorillard*, 110 N. Y. 519. More evil than good is to be apprehended from encouraging competition among rival tradesmen. *Whitney* v. *Slayton*, 40 Me. 224. Excessive competition is not now accepted as necessarily conducive to the public good. *National Benefit Co.* v. *Union Hospital Co.*, 45 Minn. 272. To the same effect, see *Oakdale Mfg. Co.* v. *Garst*, 18 R. I. 484; *Wickens* v. *Evans*, 3 Y. & J. 318; *Chappel* v. *Brockway*, 21 Wend. (N. Y.) 157; *Kellogg* v. *Larkin*, 3 Pinney (Wis.), 123.

There being, then, clearly a recognition that in some cases the public interest is not best subserved by the most extreme competition, and there being common law authority and a federal statute on the other hand protecting the public against restraints of trade, it seems axiomatic to say that each case presented should be carefully tested by balancing interests, to see whether the agreement is to the detriment of trade and the public welfare, or merely regulates to the interest of the public. In other words, there is a problem of public policy involved in every case presented, an indefinite factor, it is true, but one indubitably judicially known and acted upon.

So restraints on competition to protect good-will on the sale of a business are upheld, or contracts by an employee not to compete with the employer at the expiration of the term of an employment. *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271. The act does not forbid a patentee from stipulating that the licensee shall sell the patented article throughout the United States at a fixed price. *Bement* v. *National Harrow Co.*, 186 U. S. 70. Competing interests may join resources, though such unification will result in a virtual monopoly, when it is certain that one of them must otherwise go out of business as a result of competition. *American Press Assn.* v. *United States*, 245 Fed. 91. A sale of goods by a manufacturer involving an agreement by the vendee not to sell the goods outside of a certain state does not violate the Anti-Trust Act. *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. 593. A refusal by a manufacturer possessing practically a monopoly in his line not to sell goods to a jobber unless the latter agreed to handle the vendor's goods exclusively has been allowed. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454. An agreement made during the late war by a vendee of sugar to use it for his own needs, and under no circumstances to resell it, was sustained owing to the scarcity of that product then existing and the necessity to take measures to prevent hoarding. *Continental Candy Corporation* v. *Cal. & H. Sugar Refining Co.*, 270 Fed. 302. A fixed price, established by rule, for part of a day was held to be reasonable for the conduct of a grain exchange. *Chicago Board of Trade* v. *United States*, 246 U. S. 231. And while not strictly necessary to the decision, still in *United States* v. *U. S. Steel Corporation*, 251 U. S. 417, much is made in the decision of the fact that the combination made possible great economies; that the acquisition of one competing concern was approved by President Roosevelt for the public good; and that by consolidation the defendant had become a powerful factor in foreign trade. These cases may be readily distinguished from those where the only object of the agreement was to restrain competition or trade, and any benefit to the public would be indirect or incidental. *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600.

There being no express statement in the statute that competition of any kind must be secured; there being many expressions that excessive competition is not beneficial to the public; there being many cases in which restraints of trade or competition are held to be reasonable agreements on grounds of public policy, the majority opinion in the principal case is disappointing in not at least discussing this phase of the problem. It seems unnecessary to say that an agreement such as the defendants entered into in this case has some justification. For an extreme presentation of the arguments favoring such coöperative schemes, see EDDY, THE NEW COMPETITION. If the discussions in reports and meetings largely centered upon prices and productions, and this had a sinister aspect, a good opportunity was presented for making use of the services of that efficient body, the Federal Trade Commission. The act of its creation (38 Stat. at L. 717) provides that it may, upon the application of the attorney-general, investigate and make recom-

mendations for the readjustment of the business of any corporation alleged to be violating the Anti-Trust Acts in order that the corporation may thereafter maintain its organization, management and conduct of business in accordance with law. This would have made possible a separation of the good from the bad, and the existence of an association which possessed great possibilities—according to very good authority—to do the public a vast amount of good.

G. E. L.

RESALE PRICE MAINTENANCE.—The doctrine that the producer of a patented or "branded" article may not fix the resale price has been stubbornly contested. However, the fight in behalf of the right seems to be a losing one. The Supreme Court of the United States has for some time been definitely committed to the rule that contracts, either express or implied, made between a producer and the wholesaler or retailer through whom he markets his product, having for their object the fixing of the resale price, are illegal and in violation of the Sherman Anti-Trust Act. *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.* (1911), 220 U. S. 373; *Boston Store* v. *Graphophone Co.* (1918), 246 U. S. 8; *United States* v. *A. Schrader's Son, Inc.* (1920), 252 U. S. 85. Nor is such a contract saved by the fact that in form it purports to make the distributor simply an agent or licensee. The court will look to the real intent of the parties and judge the agreement accordingly. *Straus et al.* v. *The Victor Talking Machine Co.*, 243 U. S. 490. Mr. Justice Holmes, it is true, has consistently adhered to the contrary view. See *Garst* v. *Harris* (1900), 177 Mass. 72, and his dissenting opinions in the cases cited *supra*. Neither has the rule received universal recognition in the state courts in cases involving purely intrastate commerce. For a careful review of the authorities, see 19 MICH. L. REV. 265.

Some hope was left to the manufacturer through the decision in *United States* v. *Colgate & Co.*, 250 U. S. 300. That case seemed to hold that it was permissible for him to accomplish the result aimed at, so long as he did not seek to bind the distributor by contract. In effect, it seemed to say to him that if he could muster sufficient economic strength and create such a demand for his product that the distributor could not afford to do without it, then the producer could, by insistent warning and by a careful system of checking, accomplish unaided what the law would not assist him in achieving. See also *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 41 Sup. Ct. 451, in which the court disapproved an instruction to the jury to the effect that it might find that defendant had made a contract with its distributors fixing the resale price from the facts, if found, that the defendant had insistently notified them of its price schedules, and that they not only had not objected but had in fact coöperated in maintaining them.

However, a still more recent decision, viz., *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 42 Sup. Ct. 150, makes it at least doubtful whether this method of getting around the doctrine has not been made ineffective. The Beech-Nut Packing Company, while carefully refraining from making any contracts relating to resale prices, insistently impressed upon its distributors the fact that it would not sell to anyone who resold at other than the